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# State Responsibility for Maritime Terrorism

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# International Law Concerning Maritime Terrorism

- Application of the International Law of Piracy in the Case of Maritime Terrorism
- Development of the International Law of Maritime Terrorism
  - Rome Convention for the Suppression of Unlawful Acts against the Safety of Navigation 1988 and 2005 amendment
  - Rome Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf 1988 and 2005 amendment
- Applicability of the International Law of Terrorism
  - *International Convention for the Suppression of the Financing of Terrorism,*
  - *International Convention Against the Taking of Hostages*
  - In response to the terrorist attacks of 11 September 2001, the UN Security Council adopted Resolution 1373, in which it determined international terrorism as a threat to international peace and security. In this resolution, the Security Council imposed a number of **general and abstract obligations** binding on all members of the United Nations including *inter alia* the prevention and suppression of terrorism, suppression of terrorist financing, enhancing international cooperation and denying safe haven to terrorists and associates. *Resolution on Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1373, UN Doc S/RES/1373 (2001).

# State Responsibility for Maritime Terrorism

- Coastal State responsibility for ensuring the safe navigational rights of foreign vessels.
- State responsibility for interference with the freedom of navigation.
- Flag State responsibility for maritime terrorism using a vessel.
- State responsibilities in regards to aiding maritime terrorists.

# Coastal State responsibility for ensuring the safe navigational rights of foreign vessels

- First, do other countries have a navigational right within the waters under the jurisdiction of the coastal State?
- Secondly, if it is a right, is the coastal State a duty bearer?
- Finally, does the general obligation to prevent terrorism impose an obligation on the coastal State to take proactive measures for ensuring the peaceful enjoyment of navigational rights of other States within its jurisdiction?

# Coastal State responsibility cont.

- However, conduct of private person is not generally attributable to the State if there is no omission, inaction or failure on the part of the State in acting in accordance with the relevant international law.
- As observed by a Committee of Jurists constituted by the Council of the League Nations for a dispute between Italy and Greece regarding the assassination of Italian General Enrico Tellini and his three assistants within the territory of Greece while delimiting the Greek Albanian frontier:

“The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.”

# Interference with Freedom of Navigation for Combating Maritime Terrorism

- States have different rights and obligations in different sea zones.
- In territorial and archipelagic waters, the coastal State has the power of interference in certain circumstances, such as that of non-innocent passage.
- States have a right of innocent passage in territorial waters and other types of navigational rights within the sea areas under national jurisdiction. However, this right is not unconditional. A passage may be illegal if it is prejudicial to the peace, good order and security of the coastal State.
- If a foreign vessel engages, or undertakes preparation for engaging, in terrorist activities while in innocent passage, the coastal State can interfere and take action.
- However, dispute may arise if the interference is unjustified.
- Interference in freedom of navigation on the high seas, and particularly the interdiction and boarding of vessels are particularly critical issues in maritime security. International law has 'traditionally not been very sympathetic to measures toward the interdiction of vessels other than that of the flag state, except in extremely limited circumstances'.

# Flag State Responsibility for Maritime Terrorism Using a Vessel

- First, it is important to identify when an act of terrorism using a vessel can be attributable to the flag State of the vessel used in the terrorist act.
- If there is any inaction or omission on the part of the State, the State can be responsible.
- Moreover, as decided in the Corfu Channel Case, if the State knew or must have known of the danger, it will be deemed responsible. Those countries providing flags to unknown entities should know that this practice might create security problems for other countries. Such a practise can well be treated as an abuse of right and exercise of its right without good faith.
- UNCLOS clearly impose an obligation of good faith and prohibit abuse of rights.



# Flag State Responsibility

- Security Council resolution 1373 may be a further source of responsibility of the flag State.
- The Security Council decided that all States should refrain from 'providing any form of support, active or passive, to entities or persons involved in terrorist acts'.
- As it is now well known that terrorist groups take advantage of flags of convenience, the negligence underpinning provision of such flags may be construed as passive support to terrorist groups. Moreover, according to the resolution, member States are required to take 'the necessary steps to prevent the commission of terrorist acts'.
- Providing flags to suspicious entities may not be compatible with this obligation to take 'necessary steps'.

# State Responsibility for Aiding Maritime Terrorists

- According to the ILC Draft Articles on State Responsibility for International Wrongful Acts, an act of private persons may be attributed to a State 'if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct'.
- Although the US Domestic Court held the Sudan liable for providing material support to the terrorists in the USS Cole case, the US position was the opposite in the Nicaragua Case. In this case, the ICJ held that contra rebels could not be treated as de facto agents of the US because:

"States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, ... For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had **effective control of the military or paramilitary operations** in the course of which the alleged violations were committed."

# State Responsibility for Aiding Maritime Terrorists

- International law requires either the 'effective control' test or the 'agency' test to attribute an act of a private person to the State. However, this rigid legal position was relaxed by the ICTY in the Tadic Case.
- The tribunal gave two main grounds for not considering the Nicaragua test persuasive. The tribunal held that the effective control test did not seem to be consonant with the logic of the law of State responsibility and was at variance with judicial and State practice.
- However, the ICTY imposed an overall control test to attribute responsibility to States for acts of non-State actors.
- "the 'overall control' test applied in *Tadic Case* did indeed lower the threshold for imputing private acts to states when compared to the ICJ rule, the touchstone of both approaches is that states must direct or control-rather than simply support, encourage, or even condone—the private actor"-Derek Jinks,

# State Responsibility for Aiding Maritime Terrorists

- However, the ICJ, in the Bosnia Genocide Case, rejected the 'overall control' test proposed by the ICTY, instead holding that:

"It must next be noted that the 'overall control' test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State's responsibility can be incurred for acts committed by persons or groups of persons—neither State organs nor to be equated with such organs—only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law."

# State Responsibility for Aiding Maritime Terrorists

- However, State responsibility for aiding maritime terrorism can be established using some international treaties and the United Nations Security Council Resolution 1373. Acting under Chapter VII of the UN Charter, the Council decided that States shall '[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts'.